FOR ARGUMENT

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 77-849

NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION and MOTOR CAR DEALERS ASSOCIATION OF SOUTHERN CALIFORNIA,
Appellants,

VS.

ORBIN W. FOX CO., a corporation, MULLER CHEVROLET, a corporation, and GENERAL MOTORS CORPORATION,
Appellees.

On Appeal from the United States District Court, Central District of California

REPLY BRIEF FOR APPELLANTS

JAMES R. MCCALL
Professor of Law, U. C. Hastings,
Of Counsel
CROW, LYTLE, GILWEE, DONOGHUE, ADLER & WENINGER
431 J Street
Sacramento, California 95814
Telephone: (916) 441-2980
Attorneys for Appellants.

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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REPLY TO COUNTERSTATEMENT OF THE CASE

Northern California Motor Car Dealers Association and Motor Car Dealers Association of Southern California (hereafter "Dealer Appellants") wish to clarify two factual points which are incorrectly stated in the Counterstatement of the Case in the Brief for Appellees.

First, the District Court held that certain provisions of the California Automobile Franchise Act ("Act"), more specifically certain portions of California Vehicle Code § 3062, were, on their face, in violation of the procedural guarantees of the Due Process Clause of the Fourteenth Amendment. (See paragraph 1. of the Partial Summary Judgment of the District Court appearing on page 56 of the Appendices to the Jurisdictional Statement of Appellants New Motor Vehicle Board of the State of California, Department of Motor Vehicles of the State of California and Herman Sillas (hereinafter collectively referred to as "State Appellants").)

The District Court had before it the question of the constitutionality of certain portions of California Vehicle Code § 3062, a section contained in the Act. Those portions provide that an automobile dealer may protest the intended establishment within the dealer's "relevant market area" of a new dealership of the same "line-make" of automobile sold by the existing dealer. The protests are to be made to the California New Motor Vehicle Board ("Board"). Upon receiving a protest, the Board must automatically issue an order prohibiting the manufacturer from establishing the proposed dealership until the Board has held a hearing to determine whether "there is good cause for not permitting such new dealership" to be established.[1]

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[1]The portions of California Vehicle Code § 3062 which provide for a protest by an existing franchisee and the automatic stay order will hereafter usually be referred to as the "establishment protest provisions". The establishment protest provisions also apply when an automobile manufacturer seeks to relocate an existing franchise into the relevant market area of an existing franchisee. (See California Vehicle Code § 3062.)

A review of the District Court's Memorandum of Decision (appearing as Appendix A to the Jurisdictional Statement of Dealer Appellants) shows that the lower court was asked to declare the establishment protest provisions to be unconstitutional on their face (see Appendix A, page ii), that the lower court felt that the procedures mandated in the establishment protest provisions were in gross violation of the Due Process Clause (see Appendix A, page viii), that the lower court felt that the establishment protest provisions did not contain certain provisions required by the Due Process Clause (Appendix A, page x) and that the establishment protest provision, standing by itself, was "clearly unconstitutional" (Appendix A, page xiii). Thus, the District Court found the establishment protest provisions to be facially unconstitutional, and the "facts" elaborately discussed in the Counterstatement of the Case in the Brief for Appellees were irrelevant to the District Court's decision.

Second, the Counterstatement of the Case contained in the Brief for Appellees leaves the false impression that the Act contained no time requirements to ensure a prompt hearing and timely decision by the Board, once a dealer had filed a protest under the establishment protest provisions. However, as pointed out in the Brief for [Dealer] Appellants, at page 10, the Board is required by California Vehicle Code § 3066 to hold a hearing within 60 days following the issuance of the temporary order prohibiting a manufacturer from establishing a new dealership. Furthermore, the Board must render its decision within 30 days after holding such a hearing, or receiving a proposed decision from a hearing officer if such an official is used

to take evidence in the case. California Vehicle Code § 3067 also provides that the 30 day time period may be delayed if it is necessary to resubmit the case to a hearing examiner for additional testimony.

ARGUMENT

I. APPELLEES MAKE NO SERIOUS ARGUMENT THAT THEY ARE ASSERTING INDIVIDUAL INTERESTS WHICH QUALIFY AS EITHER "LIBERTY" OR "PROPERTY" UNDER THE FOURTEENTH AMENDMENT, NOR DO APPELLEES MAKE A SERIOUS ARGUMENT THAT THE PROCEDURES AFFORDED BY THE ACT ARE ANYTHING LESS THAN THAT PROCESS THAT IS DUE THE INTEREST WHICH THE APPELLEES ASSERT.

No serious argument is offered at pages 25 through 34 of the Brief for Appellees that the interests which they assert are deserving of procedural due process protection under this Court's decisions. Appellees Orrin W. Fox Co. and Muller Chevrolet assert the rights to operate an automobile dealership wherever and whenever they wish to do so, and Appellee General Motors Corporation asserts the right to enfranchise any dealer wherever and whenever it chooses to do so. Under no stretch of the imagination could such refined and highly expensive desires and expectations be equated with "the right of the individual . . . to engage in any of the common occupations of life", and yet Appellees consistently quote those phrases from *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) as if the incantation alone was persuasive.

Appellees, at page 27 of their Brief, quote a passage from *Green v. McElroy*, 360 U.S. 474, 492 (1959) in a similar manner. The passage, however, is pure dictum in a decision which specifically turned on the question of

whether Congress authorized the governmental action involved, not whether procedural due process was required in the situation (360 U.S. at 491-492).

The basic argument of State Appellants and Dealer Appellants is that the "right" to open an automobile dealership wherever and whenever the franchisee or franchisor would like to do so is neither a property nor liberty interest under the standards painstakingly set forth by this Court, and the rhetorical flourishes mentioned above do not address that argument. However, on pages 32 and 33 of the Brief for Appellees, an attempt is made to argue that the California Vehicle Code provisions requiring a dealer to hold a license and to maintain a place of business create a "property interest" in Appellees, now infringed by the Act. However, no explanation is given why a requirement that a licensee have a place of business creates an entitlement on the part of the license holder to open that place of business wherever or whenever he or she would like. No such explanation could be plausibly made.

On pages 33 and 34, Appellees offer the propositions that the antitrust laws give a "property" interest to Appellees, and that such an interest is also created by the contracts between the Appellees. It is obvious that the antitrust laws create only an obligation on the part of business entities to engage in fair competition; and those laws neither preempt otherwise valid state laws, nor create entitlements which constitute property interests. The argument that a contract between two private parties, not involving a right guaranteed under a state law, can create a procedural due process protected right is novel, but neither logical nor based on precedent.

At page 29 of their Brief, Appellees state that if the rights which they assert (to franchise, or be franchised as, an automobile dealer in any location whenever they wish) are not protected "liberty" or "property" interests under the Due Process Clause such rights would be "completely outside" the protection of the Fourteenth Amendment, and such a circumstance would be "an unthinkable result." This statement overlooks the obvious point that the Fourteenth Amendment, as well as other provisions in the United States Constitution, *always* protect the citizens of this country from arbitrary or irrational legislation by requiring that statutes be shown to be rationally related to a legitimate end of government. (Cf. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) and Nowak, Rotunda & Young, Constitutional Law, 407-410 (1978).)

It is obviously a legitimate purpose for a state government to seek to protect small independent dealers within its state from oppression by distant manufacturers who, through the threat of increasing the number of dealerships in a dealer's area, can cause him or her to accept onerous terms and conditions in the manufacturer-dealer relationship. It is also obviously a legitimate purpose for state government to seek to provide a rational process to ensure that a manufacturer's decision to establish a new dealership will not overload a particular market area, thereby driving existing dealers of that manufacturer into bankruptcy. Manufacturer overloading can have devastating effects on local economies if it causes bankruptcies and will often force dealers to cut back in service and repair facilities, in order to conserve assets to avoid business failure.

The establishment protest provisions of the Act provide for an independent appraisal by a state agency of whether it will be detrimental to the public interest for a manufacturer to place a new dealership in a particular marketing area. The factors which must be considered by the Board in making this appraisal are set out in Vehicle Code § 3063, and reflect the Legislature's concern with the issues of dealer failure, the effect on warranty service and repair availability for consumers, fairness to dealers involved and the adequacy of automobile sales competition in the localities impacted by the manufacturer's decision.[2] The legislatures in eighteen states have similarly passed laws prescribing conditions, and often review procedures, under which new or additional automobile dealerships may be permitted in a marketing area already served by an existing dealer carrying the same line-make of automobile.[3]

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[2]California Vehicle Code § 3063 provides as follows:

> In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board should take into consideration the existing circumstances, including, but not limited to:
>
> (1) Permanency of the investment.
>
> (2) Effect on the retail motor vehicle business and the consuming public in the relevant market area.
>
> (3) Whether it is injurious to the public welfare for an additional franchise to be established.
>
> (4) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.
>
> (5) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest.

[3]States with statutes prescribing conditions under which new or additional retail automobile franchises are permitted in the territory of an existing franchised dealer include: Arizona (Arizona Revised

The state legislation mentioned above follows the determinations made by Congress when it passed the Automobile Dealers' Day in Court Act in 1956.[4] Congressional reports and studies at that time vividly demonstrated the need for legislation to protect independent automobile dealers from abuse at the hands of giant manufacturers.[5]

Statutes 28-1304.02); California (California Vehicle Code 3062, 3063); Colorado (Colorado Revised Statutes 13-11-20); Florida (Florida Statutes Section 320-642); Georgia (Georgia Code Section 84-6610(f)(10)); Hawaii (Hawaii Revised Statutes 437-28(a) (22) (b)); Iowa (Iowa Code Annotated Section 322A.4); Massachusetts (Annotated Laws of Massachusetts 93B Section 4(3)(1)); Nebraska (Revised Statutes of Nebraska Section 60-1422); New Hampshire (New Hampshire Revised Statutes Annotated Section 357-B, Section 4(III)(1)); New Mexico (New Mexico Statutes Annotated Chapter 6 (Laws of 1973)); North Carolina (North Carolina General Statutes Section 20-305(5)); Rhode Island (Rhode Island Statutes Section 31-5.1-4(c)(11)); South Dakota (South Dakota Codified Laws Section 32-6A-3, 4); Tennessee (Tennessee Code Annotated Chapter 17 Section 59-1714(j)); Vermont (Vermont Statutes Annotated Title 9 Chapter 107 Section 4074(c)(9); Virginia (Virginia Code Annotated Section 46.1-547(d)); Wisconsin (Wisconsin Statutes Annotated Section 218.01(3)(f)); and West Virginia (West Virginia Code Volume 14 Section 47-17-5(i)).

[4]15 U.S.C. §§ 1221-1225.

[5]For example, hearings disclosed that:

> "To the manufacturers the dealership is a sales outlet to be judged solely on its efficiency in furthering the manufacturer's interests. He demands the right to increase, decrease or substitute sales outlets as he deems necessary. The dealer regards himself as an independent businessman and his franchise as a property right, the loss of which will cause him damage. This conflict in interest is between parties of totally unequal economic power. As a result, the manufacturer has been able to determine arbitrarily the rules by which the two parties conduct their business affairs. The rules are incorporated in the sales agreement which the manufacturer has prepared for the dealer's signature. A Study of the Antitrust Laws, Staff Reports on the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary 84th Cong., 2d Sess. 13 (1956).

It was determined that the existence of such imbalance was undesirable and placed too much economic power in the hands of a few:

> "The plight of the dealers is a notable example of the effects of too great concentration of economic power in the hands of a

The concluding section of the Automobile Dealers' Day in Court Act virtually invited state legislation on this matter by removing any possibility of implied preemption.[6]

The states have almost unanimously responded by passing statutes which protect automobile dealers from arbi-

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few corporation managers. A single decision by the president of General Motors may vitally affect the business of over 18,000 small business men in every city, town and village in the country. The corporation directs almost every action of the dealer, as though he were an agent or employee, but lets him bear all the burdens and risks entailed by so-called independents." *Id.* at 13.

As to the prevalence of the problem in the industry at large, it was found that "the problems of the General Motors dealers under the franchise are, in the main, common to all dealers in the industry." Senate Report at 14.

As a result, it was recommended that "legislation is needed to equalize the balance of power now heavily weighted in the manufacturer's favor." Senate Report at 14.

A parallel study reached an almost identical conclusion:

"Concentration of economic power in the automobile manufacturing industry of the United States has developed to the point where legislation is required to remedy the manifest disparity in the ability of franchised dealers of automotive vehicles to bargain with their manufacturers. Investigations of the automobile industry, moreover, demonstrate a continuing trend toward greater concentration, as well as abuse by the manufacturers of their dominant position with respect to their dealers. These investigations have disclosed practices and conditions which require new legislative methods and a change in established concepts." H. Rep. No. 2850, Report on Automobile Dealer Franchises, 84th Cong., 2d Sess. 3 (1956).

In recommending legislation designed to remedy the dealers disparate bargaining position, the importance of automobile dealers to the public was emphasized:

"While the individual automobile dealer may be classified as a small-businessman, collectively the automobile-dealer group is of great importance to the economy. Franchised automobile dealers have a total investment in their businesses in the amount of more than $5 billion and employ approximately 668,000 persons. *Id.* at 3-4

[6] 15 U.S.C. § 1225 provides:

This chapter shall not invalidate any provision of the laws of any State except insofar as there is a direct conflict between an express provision of this chapter and an express provision of State law which can not be reconciled.

trary and unreasonable cancellation of franchises without due cause, as well as by passing establishment protest provisions similar to those contained in the California Act.[7] Such state legislation has consistently been found both justified by the police power reserved to the states and rationally related to legitimate state ends. (See, e.g., *Kuhl Motor Co. v. Ford Motor Co.*, 270 Wis. 488, 71 N.W.2d 420, 427 (Wis. 1955), *Ford Motor Co. v. Pace*, 206 Tenn. 559, 335 S.W.2d 360, 369 (Tenn. 1960).

A Virginia statute, for all practical purposes identical to the establishment protest provisions in the California Act was held to be rationally based and in pursuit of a legitimate state legislative goal in *American Motors Sales Corporation v. Department of Motor Vehicles*, 445 F.Supp.

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[7]The states listed in footnote 3 have statutes protecting dealers from arbitrary franchise cancellations. In addition, the following states have comparable laws on the subject: Arkansas (Arkansas Statutes Section 75-1501 et seq. (defeated at referendum, Nov. 6, 1962); Section 75-160 et seq. (Acts 1949, No. 142, amended 1959)); Connecticut (Connecticut General Statutes Section 14-51 et seq.); Idaho (Idaho Code Section 49-135 et seq.); Kansas (Kansas Statutes Annotated Section 8-126 et seq.); Kentucky (Kentucky Revised Statutes Section 190.010 et seq.); Maine (Revised Statutes of Maine Annotated Chapter 29, Section 1 et seq.); Maryland (Annotated Code of Maryland Article 66½ Section 61 et seq.); Minnesota (Minnesota Statutes Annotated Section 168.27 et seq.); Mississippi (Mississippi Code Annotated Section 8071.3); New Jersey (New Jersey Statutes Annotated Section 39:10-1 et seq.); New York (McKinney's Consolidated Laws of New York Annotated, General Business Law Section 195 et seq., Vehicle and Traffic Law Section 415 et seq.); North Dakota (North Dakota Century Code Section 39-22-01 et seq., Section 51-07-01 et seq.); Ohio (Page's Ohio Revised Code Annotated Section 4517.01 et seq.); Oklahoma (Oklahoma Statutes Annotated Title 47 Section 22.15a, Title 47 Section 561 et seq.); Pennsylvania (Purdon's Pennsylvania Statutes Annotated Title 75 Section 409, Title 69 Section 601 et seq., Title 63 Section 801 et seq.); South Carolina (Code of Laws of South Carolina Section 46-91 et seq.) and Texas (Vernon's Texas Civil Statutes, Cities, Towns and Villages Article 1015e, State Highways Article 6686).

902 (E.D.Va. 1978). In *American Motors Sales, supra,* the District Court stated:

> Defendants assert that § 46.1-547(d) is supported by the legitimate state interest of protecting small independent automobile dealers from unfair and abusive treatment by the giant automobile manufacturers. The Court is in full agreement that this is a 'legitimate local purpose' under the Commerce Clause. The abuses occasioned by the vast disparity in bargaining power between individual motor vehicle franchises and the megacorporations which manufacture and distribute motor vehicles are well documented in the legislative history of the Federal Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225. [*citations*] Even counsel for American acknowledged in his opening statement at the DMV hearing that it would be an unfair trade practice for a manufacturer to establish so many dealerships in a trade area that it would be a foregone conclusion that not all the dealers would be able to meet the minimum sales requirements specified in their contracts. [footnote omitted] As counsel for American realized, such deliberate overloading would give the manufacturer power under the terms of the standard franchise agreement to "start terminating willy-nilly." The State undoubtedly has authority to combat such a practice. (445 F.Supp. at 907)[8]

It is clear that Appellees have no case under the proper conception of the Due Process Clause. It is also clear that the Appellees are actually arguing for a return to a "substantive due process" jurisprudence in economic matters. The attempt to strain the Due Process Clause to accom-

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[8]In *American Motors Sales,* the District Court, for invalid reasons not connected with the Due Process Clause, held the Virginia statute invalid. The decision is discussed in connection with the Commerce Clause argument of Appellees, *infra.*

plish a return to a substantive due process jurisprudence should be rejected.

II. THE TERMS OF THE ACT DO NOT CONFLICT WITH THE FEDERAL ANTITRUST LAWS AND ARE THEREFORE NOT INVALID UNDER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

If this Court chooses to consider the Supremacy Clause argument of Appellees (Brief for Appellees, pages 41-53), the argument must be rejected as an alternative ground for affirming the District Court Judgment. The only feature of the establishment protest provision which is not clearly an act of the State of California is the exercise of the power to protest to the Board, that the Act gives to an existing dealer under Vehicle Code § 3062. As Dealer Appellants point out in subargument A, the right of dealer protest created in the establishment protest provisions is clearly activity which is immune from the Sherman Act because it constitutes the exercise of the right to petition the government, and thus is protected by the First Amendment to the United States Constitution. Subargument A also establishes that even if the dealer protest provisions did not create a constitutionally protected right to petition the government, such a dealer protest directed to the only private party in a position to stop the establishment of a new franchise (the franchisor-manufacturer) would not violate the antitrust laws. Subargument B establishes that even if the private conduct authorized by the establishment protest provisions would violate the Sherman Act but for the Act, the state action immunity doctrine would still apply to the authorized private conduct and thereby immunize it from the Sherman Act.

A. The Private Conduct Authorized by the Establishment Protest Provisions of the Act does not Violate the Antitrust Laws, Because it Constitutes an Exercise of the Right to Petition the Government, or, Alternatively, is Conduct Which is "Per Se" Legal Under the Sherman Act.

Appellees argue that the establishment protest provisions of the Act, including both the creation of a right in a dealer to protest and the mandate to the Board to issue an automatic stay order, violate the Sherman Act. (Brief for Appellees, pages 41-53.) However, it is clear that automatic issuance of a stay by the Board is the act of a state agency clearly authorized, and even compelled, by a statute passed by the California Legislature. Thus, beyond question, it is immune from the application of the Sherman Act under the "state action" doctrine. (*Parker v. Brown*, 317 U.S. 341 (1945), *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) and see Areeda & Turner, Antitrust Law, Volume I, 71-92 (1978) [Hereafter references to volume I of the treatise of Professors Areeda and Turner will take the form of a citation to "AREEDA, ..." with the proper page number(s) inserted.])

The only portion of the dealer establishment provisions, therefore, which are ever arguably subject to attack under the Sherman Act is the creation, by the Legislature of the State of California, of a right exercisable by appropriate automobile dealers, to protest the establishment of franchises in their individual relevant markets. (See Vehicle Code § 3062.) But the right of a dealer to protest to a state agency is clearly immune from any application of the Sherman Act under the implied exclusion from the antitrust laws that immunizes all citizens attempting to

contact and influence their government. (*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). This exemption is based on two grounds. First is the necessity to maintain free, open and unthreatened communications between the public and its lawmakers and officials, a process which is vital to the functioning of a representative democracy. Second, "and of at least equal significance," is that a contrary decision would be a threat to the constitutionally protected right of petition found in the First Amendment. (*Eastern Railroad Presidents Conference v. Noerr, supra*, 365 U.S. at 137-138.) This exception to the application of the antitrust laws is often called the "political action" or *"Noerr-Pennington"* exception, and it expressly applies to protests to administrative agencies. (*California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); and see AREEDA, 36-41.)

In the Act, the specific method by which a dealer may protest, and the framework by which the Board shall consider that protest are established. (See Vehicle Code §§ 3062, 3063, 3066 and 3067.) Surely the First Amendment right to petition would be gravely impaired if the antitrust laws were held to apply to the exercise by a citizen of a legislatively created right to protest and thereby petition an administrative body.

While in certain narrowly defined situations the antitrust laws might be brought to bear upon, and apply to, a private protest or petition to a legislative body or executive or administrative agency under what is known as the "sham exception" to the political action exception, such

an exemption must operate on a case by case basis. It must be based upon a finding that a particular protestant, in a particular instance, did not intend to protest to the government, or to influence government action, but instead was pursuing some ulterior purpose.[9]

While the sham exception might apply to a fact situation in an individual case, it could never form the basis for holding that the right to protest or petition, as established by the legislative enactment of a state, conflicted with one of the antitrust laws, and was therefore invalid under the Supremacy Clause. It should be noted that the right of protest involved in *California Motor Transport* was very similar to the right of protest created in the Act, and this Court, while acknowledging the sham exception, clearly was one of the opinion that the *statute* there involved was valid.

While it is clear that the political action exception from the antitrust laws shields private conduct undertaken pursuant to the establishment protest provision, there would be no antitrust violation in any event in a situation in which a single firm, not pursuant to a collective agreement, protests the establishment of a new dealership or franchise to the franchisor, the only other entity besides a governmental body which could prevent the establishment of a new franchise. The establishment protest provisions authorize *only* unilateral action, in the form of a single dealer, to lodge a protest. Beyond argument, cases interpreting the Sherman Act are quite clear on the point that dealers have

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[9]The sham exception principle was mentioned by this Court in *Noerr, supra,* 365 U.S. at 144, and also in *California Motor Transport, supra,* 404 U.S. at 512.

a right to unilaterally protest the establishment of a new dealership by a manufacturer, and agreements by manufacturer giving an exclusive dealership to an existing dealer are considered "per se legal" under § 1 of the Sherman Act.[10]

Leaving aside the question of whether the private conduct authorized by the establishment protest provisions constitutes "state action", it is clear that there can be no preemption of a state statute by the Sherman Act unless the private conduct it authorizes violates the Sherman Act. Thus there can be no application of the preemption doctrine to the establishment protest provisions, because the only conduct by private parties which is authorized under that provision is specifically immunized from application of the Sherman Act under the political action doctrine, and, even if no petition to the government were involved, the private conduct authorized by the provision would not violate the Sherman Act.[11]

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[10]See *Packard Motor Car Co. v. Webster Motor Car Co.* (D.C. Cir. 1957) 243 F.2d 418, 420, *cert. denied* 355 U.S. 822 (1957). While it is conceivable that an exclusive dealership might raise problems under § 2 of the Sherman Act, it is interesting to note that if such a monopolization situation developed, the Board virtually would be required, under the criteria established for passing upon the validity of a dealer protest, to deny any dealer protest which served to maintain or establish a monopoly. (See California Vehicle Code § 3063(5).)

[11]The private conduct authorized by the dealer protest provisions is thus quite different from all of this Court's state action exemption cases involving activity of private parties undertaken pursuant to a state statute. In all of the cases of that type decided by this Court, the activities of the private parties would clearly have been *per se* illegal under the antitrust laws but for the existence of a particular state statute. [See *Parker v. Brown, supra,* involving market allocation and price fixing, which was held legal under the state action exemption; *Goldfarb v. Virginia Bar* 421 U.S. 773 (1975), involving price fixing which was held to be outside the scope of the exemption and thus illegal; *Cantor v. Detroit Edison Co.* 428 U.S. 579

Appellees make no tenable argument that the private conduct authorized by the Act would be held to violate the Sherman Act, but for the existence of the Act. Appellees' arguments on this point are contained at pages 41-47 of the Brief for Appellees, wherein a claim is made that the creation of a right of an individual dealer to protest the establishment of a new franchise constitutes a form of collective horizontal market allocation (Brief for Appellees, page 42). Such an argument totally overlooks the fact that the establishment protest authorized in the Act is a *unilateral* protest by a single firm.

Appellees further claim that the establishment protest provisions are somehow *per se* illegal by analogy to the vertical price fixing involved in *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) and *Rice v. Alcoholic Beverage Control Board*, 21 Cal.3d 431, 146 Cal.Rptr. 585, 579 P.2d 476 (1978). (Brief for Appellees, pages 43-47.) These two decisions hold that vertical price fixing activities unsupervised by any state agency are not shielded by the state action exemption. But the case at bar involves an Act authorizing a single firm to protest to a state agency that actively supervises the administration of the Act. If either *Schwegmann* or *Rice* have any

(1976), involving tie-in selling, which was held to be outside the scope of the state action exemption; *Bates v. Arizona State Bar, supra,* involving horizontal restrictions on advertising, which were held to be protected by the state action exemption; and *City of Lafayette v. Louisiana Power & Light Co.*, 98 S.Ct. 1123 (1978), involving monopolistic practices on the part of a city which were held to be outside the state action exemption. Also note *Rice v. Alcoholic Beverage Control Board*, 21 Cal.3d 431, 146 Cal.Rptr. 585, 579 P.2d 476 (1978), involving vertical price fixing, which was held by the California Supreme Court to be outside the scope of the state action exemption.]

relevance to this litigation, it is nowhere explained by Appellees.

B. The Private Conduct Authorized By the Establishment Protest Provision Constitutes "State Action", and Would, In Any Event, Thus Be Exempt From the Application of the Antitrust Laws.

Dealer Appellants have previously argued that the activities of both the Board and dealers mandated and authorized by the establishment protest provisions are shielded from the application of the Sherman Act by the second major implied exception to the antitrust laws, the state action doctrine. (See Brief for Appellants, pages 19-23.)

Appellees argue that if the right of dealers to protest created in the establishment protest provision is illegal under the Sherman Act, it is not shielded by the state action doctrine of *Parker v. Brown, supra,* because the decision of a dealer to protest, and thereby initiate action on the part of the Board, is not supervised by the Board (see Brief for Appellees, pages 48-53). Actually, Appellees seem to argue that the private conduct authorized by the establishment protest provision includes not only the right of a dealer to protest, but also the issuance of the automatic stay by the Board. However, as mentioned above, even Appellees must concede that when a state agency, such as the Board, is compelled to act by an express mandate by the State Legislature there is no doubt that such activity constitutes state action and is exempted from the antitrust laws. Thus the only logical way to frame Appellees' argument is that *if* a dealer protest is illegal under the Sherman Act, then that dealer protest is private conduct which does

not constitute "state action" for purposes of that exemption.

While some private conduct allegedly undertaken pursuant to a state statute has been held to be outside the state action exemption, it is clear that a dealer protest as established in the establishment protest provisions would be protected by the state action exemption *even if* the activity of protesting could be considered to be in violation of the Sherman Act. As this Court has made quite clear, where (1) private conduct is clearly authorized by a state statute, (2) that shows the clear intent on the part of the state legislature to displace competition (and the operation of the antitrust laws) in the operation of an industry and (3) there is adequate state supervision and final control over the permanent operation and effects of the private conduct, the private conduct in question will be considered to be "state action" and therefore immune from the federal antitrust laws. (See *Parker v. Brown, supra; Bates v. Arizona State Bar, supra,* 433 U.S. at 359-363; and see AREEDA, 77-92.) All of this Court's state action decisions are consistent with this three part test.[12]

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[12]In *Parker v. Brown, supra,* the production quota setting, although initiated upon request of private parties, was subject to governmental regulation and was clearly an activity specifically authorized by the state legislature. Under these facts this Court held the state action exemption applied. In *Goldfarb v. Virginia State Bar, supra,* the price fixing activity was not supervised by a state agency and was not clearly authorized by a state statute. Accordingly, this Court held that the private conduct was not "state action" for purposes of claiming immunity. In *Cantor v. Detroit Edison, supra,* the tie-in sales activity was not specifically authorized by a state statute and the amount of state control and regulation of the tie-in selling activity was minimal. In *Bates v. Arizona State Bar, supra,* the private activity of suppressing advertising was held to be protected by the state action doctrine

Applying the three-part test to the private conduct authorized by the establishment protest provisions, it is clearly seen that the private conduct qualifies as state action. First, dealer protests are clearly authorized by the provision. Second, the provision and the Act in question clearly show a legislative intent to displace "competition," and the application of the antitrust laws, from this particular operation in the automobile distribution industry, and substitute state regulation. Third, the state, acting through the Board, provides adequate state supervision and final control of the operation and permanent effects of the private conduct.

Only the third point requires any additional comment for clarity. The Board, of course, controls the question of whether or not the establishment of any new dealership will be permanently enjoined; and the Board controls the length of time during which any temporary injunction can be in effect, since the injunction must end when the Board has reached its decision. Thus the Board acts in a way which is very similar to the operation of the Arizona Supreme Court as discussed in *Bates v. Arizona State Bar* decision. In *Bates,* private parties (local bar association

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because it was clearly and specifically authorized by a state agency and a state agency retained control and supervision over the private parties engaged in suppression of advertising. In *City of Lafayette v. Louisiana Power & Light, supra,* a city was held to be the equivalent of a private person for purposes of the state action exemption and, due to the fact that a clear legislative authorization was not available for the alleged monopolistic conduct, the city was unable to claim the state action exemption. In addition, note *Rice v. Alcoholic Beverage Control Board* (1978) 21 Cal.3d 431, in which the private vertical price fixing activity was held to be outside the state action immunity because, even though a state statute specifically authorized the activity involved, the state exercised no control or regulation of the anticompetitive activity (see 21 Cal.3d at 445).

officials) initiated any action to suspend or disbar an attorney from practice because of advertising activities. However a disbarred or suspended attorney had a right of appeal to the Arizona Supreme Court, a state agency, which thus had final control and supervision over the private conduct of local bar officials. This Court held that such supervision, as well as the clear authorization for the private conduct and the clearly shown intent of a state agency to prohibit advertising, meant that the advertising prohibition rule in question, and its enforcement, were immune from the application of the antitrust laws, even though vulnerable under the First Amendment.

Although this Court has not heretofore directly addressed the status of private conduct which merely initiates or triggers formal state action, it clearly viewed such initiating conduct on the part of private parties to be state action in both *Bates v. Arizona State Bar, supra,* and *Parker v. Brown, supra.*[13] Commentators have taken the position that the fact that under a legislative scheme a private party initiates the state action in question does not make the state supervision inadequate for purposes of the state action immunity. (AREEDA, 77 and 92-97) Such a position is not only consistent with, but is compelled by this Court's decisions. It is also supported by the sound policy consideration that private initiation or protesting to a state action is a useful device by which the government can efficiently and expeditiously rely upon private parties to

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[13]In *Bates*, as mentioned *supra*, private parties initially brought suspension or disbarment proceedings against lawyers violating the ban on advertising. In *Parker*, private parties initiated and formulated the production allocation plans, and had to approve such plans before California could adopt them.

bring to official attention those situations which require formal action of the state. As acknowledged in the political action exception to the antitrust laws, the need of government for information is crucial. This need for information compels the conclusion that a statute authorizing a private party to initiate state action does not thereby establish that state supervision is inadequate for the purpose of the state action exception.[14]

Raising what appears to be a closely related issue, Appellees have argued that private conduct cannot be deemed state action unless it is *compelled* by the state, and that mere state authorization for the conduct is insufficient. But this position overlooks the *Parker v. Brown* decision itself (where the raisin growers were not compelled to initiate allocation plans, but were merely authorized to do so). The fact that a state law compels certain private conduct, is only significant insofar as it shows a clear intent on the part of the state legislature to displace competition in the operation of an industry. However if such an intent is clearly shown by other features of the statute, the fact that law authorizes, rather than compels, the private conduct is irrelevant. (AREEDA, 92-97)

Finally, it should be noted that distinguished commentators have voiced the obviously valid thought that there are other prohibitions contained in the United States Constitution which are far better suited for attacking

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[14]Of course, as discussed supra, it is Dealer Appellants' position that the political action exception applies to the right of dealer protest created by the establishment protest provisions. Those provisions therefore could never be held to be in violation of the antitrust laws, regardless of whether the state action immunity would be applicable to dealer protest activities.

so-called "anticompetitive laws" than is the Supremacy Clause when linked with the Sherman Act.[15] (AREEDA, 131-133) This Court is clearly in agreement with this proposition, as evidenced by its statement that ". . . [A]n adverse effect on competition [is not], in and of itself enough to render a state statute invalid . . ." by reason of a conflict with "the central policy of the Sherman Act", (*Exxon v. Governor of Maryland,* 98 S.Ct. 2207, 2218 (1978)). Were this Court to take a contrary position, it is hard to see how states could perform their traditional functions of regulating economic activity under the police power reserved to them by the Tenth Amendment.

III. THE DISTRICT COURT JUDGMENT SHOULD NOT BE AFFIRMED ON THE GROUND THAT THE ESTABLISHMENT PROTEST PROVISION IN THE ACT VIOLATES THE COMMERCE CLAUSE.

Appellees argue, by way of footnotes, that the establishment protest provisions in the Act are unconstitutional because of an alleged conflict with the Commerce Clause. (Brief for Appellees, footnote on page 3 and footnote 40 on pages 53-55.) As this Court may wish to consider this point, Dealer Appellants will respond to Appellees' elab-

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[15]Such other constitutional prohibitions, of course, include the Due Process Clause and the Commerce Clause. While the prohibitions flowing from either might strike down a state "anticompetitive" law in a particular instance, neither support Appellees' contention that the California Act herein involved is unconstitutional. (See Due Process Clause discussion *supra* and Commerce Clause discussion *infra.*) In footnote 36 on page 44 of Brief for Appellees it is implied, although not directly argued, that the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225, preempts the California Act under the Supremacy Clause. However, as Dealer Appellants have already pointed out, § 1225 of that statute specifically contradicts this argument. (See Brief for Appellants, page 23.)

orate footnote by a brief discussion establishing that this Court's recent decision in *Exxon Corporation v. Governor of Maryland, supra,* convincingly answers Appellees' contentions.

The *Exxon* decision establishes the proper framework of analysis for a consideration of whether a state statute affecting manufacturer-dealer relationships, such as the establishment protest provisions, violates the Commerce Clause. *Exxon* also demonstrates that the method of analysis and result reached by the District Court in *American Motor Sales Corp. v. Department of Motor Vehicles,* 445 F.Supp. 902 (E.D. Va. 1978), upon which Appellees so heavily rely, was clearly misconceived and erroneous.

In *American Motor Sales,* a challenge was made by American to a provision in the statutes of the State of Virginia which was similar to the establishment protest provisions in the Act now before this Court. The District Court held that the Virginia statute violated the Commerce Clause because, in the opinion of the judge, the Viriginia statute was not the *least* burdensome legislative scheme that the Virginia State Legislature could have devised to meet the problem posed by manufacturers overloading a relevant trade area with excessive dealerships (see 445 F. Supp. at 911). The District Court clearly chose to sit as a "super legislature" and evaluate the wisdom of the Virginia Legislature in choosing between alternative statutes which it might have passed. To arrive at this position, the District Court, on the basis of no empirical evidence, found that "because the challenged statute restricts the sale of automobiles at certain locations, it affects interstate commerce." (see 445 F.Supp. at 905) The Court proceeded to

engage in a balancing analysis by weighing the local benefits produced by the Virginia statute against the severity of the assumed "burden" imposed upon interstate commerce. Eventually, the court was led to a final determination of whether, given the assumed fact that a burden had been imposed on interstate commerce by the statute, there was a less burdensome alternative that the Virginia Legislature might have chosen. The court then found that there was a less burdensome alternative statutory scheme which the Virginia Legislature might have adopted. Therefore the Virginia statute was struck down as being in violation of the Commerce Clause.

While the less burdensome alternative analysis, or the super legislature approach, might be arguably justified on the basis of statements made by this Court, taken out of the relevant factual context of its decisions, it is clear that *Exxon,* decided three months after *American Motor Sales,* flatly rejects such a balancing, or less restrictive alternative, analysis, except on a showing of *either* discrimination against interstate commerce effected by the state statute involved, *or* a clearly demonstrated significant restriction on the flow of interstate commerce effected by the statute.

In *Exxon* this Court considered a Commerce Clause attack on a Maryland statute which prohibited producers or refiners of petroleum products from operating retail service stations within that state. This Court first established that there is no possible violation of the Commerce Clause unless the state statute involved either discriminates against interstate sellers, or a factual showing is made

that the statute will cause actual substantial impediment to the flow of interstate commerce.

The California Act before the court in this case treats all automobile manufacturers, whether they be located in California, a sister state or a foreign nation, in the same evenhanded manner. All such manufacturers must give notice of the intent to establish a new automobile franchise to appropriate dealers, and obey the orders of the Board. This evenhanded approach is exactly the same as the nondiscriminatory treatment afforded by the Maryland statute to all petroleum producers or refiners, whether in-state Maryland corporations or not. (See 98 S.Ct. at 2214.) Thus the California Act does not discriminate against interstate commerce, and no factual finding of discrimination can be made as the necessary premise to support a less burdensome alternative balancing analysis.

Nor can a less burdensome alternative balancing analysis be based upon any factual finding that the California Act imposes an actual substantial impediment to the flow of interstate commerce in automobiles into the state. The discussion by this Court in *Exxon* establishes this conclusion beyond argument. In *Exxon,* this Court noted that the prohibition against retail operations on the part of producers or refiners would cause them to close down a number of company-operated stations. However this was no reason to assume that the flow of interstate commerce would be substantially impeded, or, in the words of the court, that the share of the petroleum products market in the State of Maryland held by such producers would not be replaced by other refiners (see 98 S.Ct. at 2214). Pursuing the point, this Court made it clear that the Commerce

Clause protects the flow of interestate commerce and does *not* protect ". . . the particular structure or methods of operation in a retail market." (98 S.Ct. at 2215)

With citations to *Hughes v. Alexandria Scrap Corporation,* 426 U.S. 794, 806 (1976) and *Breard v. Alexandria,* 341 U.S. 622 (1951), this Court further stated:

> ". . . [T]he Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations. It may be true that the consuming public will be injured by the loss of the high-volume, low-priced stations operated by the independent refiners, but again that argument relates to the wisdom of the statute, not to its burden on commerce." (98 S.Ct. at 2215.)

The *Exxon* decision completely answers any argument the California Act violates the Commerce Clause. Any "effect" which the Act might have on the interstate shipment of automobiles into California is total conjectural —a subject on which no factual findings were made by the District Court. It would also appear to be clear that any conceivable effect on the flow of interstate commerce in automobiles caused by the Act will be less than the effect on such commerce produced by the outright prohibition of retail operations mandated by the Maryland statute.

Appellee General Motors is herein merely complaining that it is not able to establish new dealerships at its total and unfettered discretion. It can point to no substantial lessening of the flow of automobiles into California which has been caused by the Act. Aside from the point that there has been no factual inquiry at this point in the litigation on that subject, it is safe to assume that no such show-

ing can be made, because there has been no such lessening of the flow of automobiles into California. To paraphrase this Court's decision in *Exxon:* it is the flow of interstate commerce which the Commerce Clause protects, and not any particular retail market structure or the preferred methods of operation or other predilections of a given manufacturer or retailer. Since neither of the alternative preconditions that must be satisfied before a less burdensome alternative balancing analysis is warranted has been met, the Commerce Clause issue is resolved.

Where no discrimination against out-of-state firms is involved, it is clearly correct to require a party attacking a state statute on Commerce Clause grounds to make a factual showing that the flow of interstate commerce has been substantially impeded, before a less burdensome alternative balancing analysis is proper. No court should self constitute itself as a super legislature in economic matters absent a clear and demonstrated necessity. While a balancing of less burdensome alternatives was appropriate in the cases in which this Court has engaged in the practice, the facts in those cases showed either discrimination or actual substantial impediment to the flow of interstate commerce.[16]

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[16]See *Hunt v. Washington Apple Advertising Commission,* 432 U.S. 333 (1977), discrimination was effected by a North Carolina statute that required out-of-state apple sellers to alter their grading systems at great expense to comply with North Carolina grading requirements; *Great Atlantic & Pacific Tea Co. v. Cottrell,* 424 U.S. 366 (1976), an actual substantial impediment resulted from a Mississippi statute forbidding an out-of-state firm from selling milk in Mississippi unless the out-of-state firm's state had signed a reciprocity agreement accepting the sale within its borders of Mississippi milk; *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970), an actual substantial impediment resulted from an Arizona statute requiring that cantaloupe grown in Arizona be shipped out-of-state in crates inspected in Arizona, thus requiring an Arizona grower with a Cal-

The proposition that a less restrictive alternative balancing analysis is proper upon the finding of a theoretical burden on interstate commerce (which amounts to little more than an assumed fact) was wisely rejected by a convincing vote of 7 to 1 by the Court in *Exxon*. Appellees would have this Court resurrect this rejected notion, and apply it in this case in the same manner as the District Court in the *American Motor Sales* case.

Appellees apparently resurrect the notion that automobile sales are a "national industry" and "therefore [its] problems . . . should be addressed by Congress". (Brief for Appellees, page 55.) The notion that the existence of a "nationwide" market in a product, by that fact alone, somehow eliminates any power of the states to regulate any aspect of the retail distribution of the product was convincingly rejected by this Court in *Exxon*. (See 98 S.Ct. at 2215.)

Finally, Appellees imply that a statement in a House Committee Report on the subject of automobile dealer franchises somehow "preempts" California from passing legislation dealing with automobile-dealer relations. (See reference to House Committee on the Judiciary, Report on Automobile Dealer Franchises, H.R. Rep. No. 2850, 84th Cong., 2d Sess. 3 (1956), in footnote 43 on page 55 of the Brief for Appellees.) Of course, only federal *statutes* preempt state legislation, and the Automobile Dealers' Day

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ifornia packing plant to spend nearly $200,000 to build a packing plant in Arizona; and *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), discrimination resulted from a Madison, Wisconsin ordinance prohibiting the sale in Madison of milk pasteurized and bottled at a plant further than five miles from the center of the city, thus effectively preventing the sale in Madison of out-of-state wholesome milk.

in Court Act, a legislative product of the Congressional process of which the House Committee Report was a part, contains a specific section, codified as 15 U.S.C. § 1225, which expressly precludes preemption except insofar as a direct conflict exists between express provisions of the Dealers' Day in Court Act and any state legislation.

IV. THIS COURT SHOULD NOT REVERSE THE DISTRICT COURT ON THE GROUND THAT THAT COURT SHOULD HAVE ABSTAINED FROM RULING ON THE CONSTITUTIONAL ISSUES BEFORE IT.

Dealer Appellants agree with Appellees that, at this point in time, this Court should not reverse the District Court on the ground that that court committed error in refusing to abstain from determining the constitutional issues before it. The question of whether a federal court should abstain from determining an issue on constitutional grounds on the basis of *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941) is a different and distinguishable question from whether or not abstention from determining such issues is required by the doctrine announced by this Court in *Younger v. Harris*, 401 U.S. 37 (1971). (*Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 477 (1977).)

Since the question of whether the District Court erred by not abstaining on the basis of the *Younger* doctrine was not raised by either the Dealer Appellants or the State Appellants in their respective jurisdictional statements, the issue is not properly before this Court under Rule 40 (1)(d)(2) of the Revised Rules of this Court. Furthermore, in view of the fact that abstention pursuant to the *Younger* doctrine is arguably not applicable to ad-

ministrative proceedings, it cannot be said that the failure of the District Court to abstain on the basis of the doctrine constitutes a "plain error" for purposes of Rule 40 (1)(d)(2) of this Court.[17]

Dealer Appellants also submit that the District Court did not err in refusing to abstain on the basis of the *Pullman* doctrine. The clarity of the establishment protest provisions makes it unlikely that a state court ruling might be delivered which would materially change the nature of the constitutional problem which the District Court felt the Act presented. (*Bellotti v. Baird* (1976) 428 U.S. 132, 147.) In any event, the abstention authorized under the *Pullman* doctrine is equitable in nature, and due to the speculative nature of the possible benefits of abstention to the District Court, that tribunal was well within its discretion to find that *Pullman* abstention was not warranted. (See *Ohio Bureau of Employment Services v. Hodory,* 431 U.S. 471, 481 (1977).

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[17]See *Ohio Bureau of Employment Services v. Hodory, supra,* 431 U.S. at 479-80, where this Court noted the District Court's holding that Younger-Huffman abstention "did not apply to a challenge to administrative proceedings", affirmed the rejection of abstention on other grounds, and stated in footnote 10 that "In view of this conclusion, we need not and do not express any view on whether the District Court erred in refusing to abstain on *Younger* grounds."

CONCLUSION

For the foregoing reasons, Dealer Appellants submit that the judgment of the District Court should be reversed.

September 20, 1978.

Respectfully submitted,

JAMES R. MCCALL
Professor of Law, U. C. Hastings,
Of Counsel
CROW, LYTLE, GILWEE,
DONOGHUE, ADLER &
WENINGER
Attorneys for Appellants.